of the accident and of the injuries received within 14 days of the date of the accident. The assured met with an accident in July but was not aware that he had received injury until the following March when he at once gave notice to the insurers. In an action upon the policy it was held that the notice was not within the time limited by the policy and that therefore the assured was not entitled to recover. This case was reported in a very abbreviated form and the provisions of the proviso were not reproduced therein for any satisfactory comparison to be made. In any event the language of the relevant provision of condition 7 is, to my mind, clear and unambiguous and upon a natural construction of those provisions, I hold that the defendant is not entitled to repudiate the plaintiff's claim on the ground of breach of that condition.

In the result, I would give judgment in favour of the plaintiff for the sum of $200,000 for permanent disablement and the agreed sum of $2,250 as indemnity for the cost of medical and surgical treatment incurred with interest at 4% pa from the date of repudiation. The plaintiff is entitled to his costs in this suit.

Claim allowed.

Solicitors: *John Ang & Jega; Varughese Kumar Netto & Partners.*

Reported by *Azra Moiz*

Re Yamaha (Malaysia) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO 76 OF 1981
SITI NORMA YAAKOB J
2 FEBRUARY 1990

Contract — Accord and satisfaction — Debt owing by company — Creditor entering into arrangement with associate company regarding repayment of debt — Mortgages created over properties pursuant to arrangement — Properties sold — Proceeds utilized by creditor to settle other liabilities of associate company — Whether debt of company discharged — Contracts Act 1950, s 64

Civil Procedure — Limitation — Enforcement of judgment — Judgment obtained against company — Company wound up by order of court — Appeal by creditor against rejection by liquidator of proof of debt — Whether appeal a mode of enforcement — Date from which time runs — Companies (Winding-Up) Rules 1972, r 93 — Limitation Act 1953, ss 2, 3 & 6

Yamaha (Malaysia) Sdn Bhd was wound up by order of the court on 22 February 1982. The applicant, Indian Overseas Bank, lodged a proof of debt for the sum of $2,947,032.06 with the liquidator of the company. Relying on a statement by a director of the company, the liquidator had rejected the proof on the ground that the debt had already been paid. By a motion dated 18 April 1987, the applicant appealed to the court against the rejection of the proof. The applicant had granted credit facilities to an associate company in Singapore, part of which was used for the benefit of the company in the form of three bills of exchange. Following the dishonour of the bills, the applicant sued the company and obtained judgment on 19 May 1978 for the sum of $2,947,032.06. The applicant had also sued the associate company and six of its directors in Singapore for the recovery of all sums due under the facilities, which facilities included seven trust receipts and the three bills. The applicant obtained judgment in Singapore for the sum of $4,629,770.84 which sum included the sum due under the three bills. Following negotiations, in consideration of the applicant forebearing from executing the judgment obtained in Singapore, the associate company agreed to make monthly repayments towards the judgment debt and as security for this arrangement, certain properties were mortgaged to the applicant. Following a default by the associate company in making the payments, the applicant sold some of the properties and from the proceeds of sale and other payments, the total sum of M$3,656,655.80 was paid to account and which the director contended should have been utilized first towards settlement of the three bills, as liability on those bills had arisen earlier in point of time to the trust receipts.

The applicant's motion was also opposed by a contributory of the company, namely, Sucaba Holdings Bhd on the ground that there had been accord and satisfaction of the debt by the terms of the settlement reached in Singapore. Sucaba Holdings Bhd also contended that no arrears of interest could be claimed for the period prior to 18 April 1981 (being the date six years prior to the date of the filing of the motion) as the claim was barred by limitation, and relied on s 6(3) of the Limitation Act 1953. It was contended for the applicant that the motion was intended to enforce a judgment as opposed to the commencement of an action to enforce the judgment. It was also contended that the relevant limitation period was prescribed by r 93 of the Companies (Winding-Up) Rules 1972 upon which the motion was founded. The applicant further contended that any action to recover money secured by any mortgage or charge on land or personal property was outside the limitation period prescribed by s 6(1) of the Act and hence s 6(3) of the Act was not applicable.

Held, allowing the applicant's appeal:

(1) For there to be accord and satisfaction, there must be a tender which is accepted as satisfaction of the debt due from the party in whose favour the tender is made.

(2) For Sucaba Holdings Bhd to succeed in their contention, they must establish that the applicant had agreed that the mortgages executed in its favour as part of the settlement reached with the associate company were in satisfaction of the amount due from the company.

(3) The mortgages were created as security for the arrangement enabling the associate company to settle its indebtedness to the applicant and it was a term of each of the mortgages that the applicant shall, in addition to exercising its right as a mortgagee, also exercise its rights as a judgment creditor. There was also no evidence of any arrangement that any instalment payment received from the associate company should be utilized first towards the settlement of the three bills.

(4) In calculating when time began to run for the purpose of limitation, what was more important was the date when judgment was entered as it was from that date that time started to run. Since the judgment was obtained on 19 May 1978, the six-year limitation period as far as enforcement of arrears of interest was concerned commenced from that date.

(5) The effect of bringing the present proceedings was nothing more than to seek enforcement of the judgment obtained in 1978 and to that extent s 6(3) of the Limitation Act 1953 was applicable. The period of limitation in r 93 of the Companies (Winding-Up) Rules 1972 regulates when a notice of motion should be brought, and it has got nothing to do with the limitation period of enforcing a judgment. The mortgages were created in Singapore in respect of the Singapore judgment. What was sought to be enforced was not the Singapore judgment but the Malaysian judgment.

[*Editorial Note*: Sucaba Holdings Bhd has appealed to the Supreme Court vide Civil Appeal No 02-59-90.]

Legislation referred to
Contracts Act 1950 s 64
Limitation Act 1953 ss 2, 3, 6
Companies (Winding-Up) Rules 1972 r 93

David Morais for the applicant.
P Ganapathy for the liquidator of Yamaha (Malaysia) Sdn Bhd.
Lim Chor Pee for Sucaba Holdings Bhd.

Cur Adv Vult

Siti Norma Yaakab J: On 22 February 1982, Yamaha (Malaysia) Sdn Bhd ('Yamaha') was wound up pursuant to an order of court and Encik Abdul Samad bin Hj Alias of Arthur Andersen & Co was appointed the liquidator.

As at the date of the winding-up order, Indian Overseas Bank, the present applicant before me, was an unsecured creditor of Yamaha as it had obtained judgment against Yamaha on 19 May 1978 in Kuala Lumpur Civil Suit No 265/78 for $2,947,032.06. On 31 May 1985, the applicant lodged all the necessary papers as proof of this debt with the liquidator but following investigations conducted by the liquidator, he rejected the proof of debt on 30 March 1987 on the grounds that the debt had already been settled.

Dissatisfied with the liquidator's decision, the applicant has filed the present notice of motion under r 93 of the Companies (Winding-Up) Rules 1972, seeking to reverse or vary the liquidator's decision.

On his part, the liquidator relies on a statement made by one Yeo Kian Peng, a director of Yamaha who is also the managing director of Motorcycle Industries (1973) Pte Ltd ('MIL'), an associated company based in Singapore and in whose favour the applicant had granted the facilities on which the debt arose. From Yeo's statement, it is clear that the applicant had granted a line of credit to MIL, part of which was used for the benefit of Yamaha, in the form of three bills of exchange. When these three bills are dishonoured on their due dates, the applicant sued Yamaha in KL CS No 265/78 for which judgment for $2,947,032.06 was obtained against Yamaha on 19 May 1978.

In addition to this Malaysian suit, the applicant had also sued MIL and six of its director guarantors in the High Court in Singapore for the recovery of all the facilities extended by the applicant to MIL. These facilities included the amounts due under seven trust receipts as well as the three bills of exchange, liability for which has also been claimed by the applicant against Yamaha in the Malaysian suit.

The applicant obtained judgment against MIL and its directors in the Singapore suit on 27 March 1978 for the sum of S$4,629,770.84 which amount included the amounts due under the three bills of exchange as well.

It is Yeo's contention that following the judgment entered in the Singapore suit, negotiations took place in 1979 with a view to settling MIL's indebtedness to the applicant. A compromise was reached whereby in consideration of the applicant deferring from executing the Singapore judgment, MIL would make monthly instalments towards the judgment debt and as security for this instalment arrangement, six properties in Singapore belonging to some third parties were mortgaged to the applicant. Following the execution of the mortgages, MIL fell behind in its instalment payments and the applicant sold five out of the six mortgaged properties and from the proceeds of sale and other payments, a sum of M$3,656,655.80 have been paid to account which Yeo contends should have been utilized first towards settlement of the three bills of exchange, as liability on those bills arose earlier in point of time to the seven trust receipts. It was in reliance of this explanation given in the statement that the liquidator had decided that the judgment debt due to the applicant from Yamaha had already been settled in full.

Apart from the liquidator, this motion is also objected to by Sucaba Holdings Bhd ('Sucaba'), a contributory of

Yamaha, on the grounds that there has been accord and satisfaction of the debt due from Yamaha by the terms of the settlement reached in the Singapore suit. They also claim that even if the court finds that there was no accord and satisfaction, no arrears of interest can be claimed prior to 18 April 1981 as they are barred under s 6(3) of the Limitation Act 1953.

The facts surrounding the filing of the two suits by the applicant, one in Malaysia against Yamaha and the other in Singapore against MIL and its directors are not disputed and neither are the judgments obtained in the two suits challenged by either the liquidator or Sucaba. However what is in issue is whether the judgment due from Yamaha has been settled in full as maintained by the liquidator and whether there has been accord and satisfaction of the judgment debt as maintained by Sucaba.

Taking the plea of accord and satisfaction first as being the more substantial of the two issues, that principle of law is now embodied in s 64 of the Contracts Act 1950 which reads as follows:

> Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.
>
> Illustrations
>
> ...
>
> (c) A owes B $5,000. C pays to B $1,000 and B accepts them in satisfaction of his claim on A. This payment is a discharge of the whole claim.

For there to be accord and satisfaction, there must be a tender by the third party which is accepted as satisfaction of the debt due by the party in whose favour the tender is made. On the facts of this case before me, Sucaba must establish that the applicant had agreed that the mortgages executed in its favour as part of the settlement reached with MIL is in satisfaction of the amount due from Yamaha.

This brings me to the contemporaneous documents that were executed pursuant to the compromise reached between the applicant and MIL in an effort to settle MIL's indebtedness with the applicant.

I start with a letter dated 9 March 1978 which is signed by both MIL and five of its six directors that were sued in the Singapore action and the applicant. In paras 1 and 2, MIL and the other defendants in the Singapore suit admit liability for the amount claimed in the Singapore civil suit and consent to judgment being entered. In para 3, there is agreement that the judgment sum shall be settled by instalments with an immediate payment of $300,000 and subsequent monthly instalments for the same amount payable on or before the 25th day of each month, beginning April 1978 until the whole amount has been fully settled. In para 4, there is an undertaking to pay the amount due from Yamaha on the three bills of exchange. In the event Yamaha fails to pay and that notwithstanding their agreement, the applicant was at liberty to proceed against Yamaha in the Malaysian courts. Then at para 6, upon MIL's assurance that should eight of the listed properties which were then mortgaged to Chartered Bank be discharged, a first legal mortgage will be created over the properties in favour of the applicant for forbearing not to execute or take out bankruptcy and/or winding-up actions against MIL or any of its directors on the Singapore judgment to be entered. Lastly, there is the undertaking by MIL at para 7 that should the terms and conditions of the agreement be breached by them, the applicant was at liberty to execute on the judgment sum.

Mortgages in respect of the six properties in Singapore were executed by third parties in favour of the applicant on 4 November 1978.

Here I pause to ask what is the purpose of creating the mortgages in favour of the applicant? The answer must be in the letter dated 9 March 1978 and the mortgages themselves.

From my reading of the clear words and intentions as expressed in the letter, there can be no doubt that the mortgages were created as security for the arrangement enabling MIL to settle its indebtedness with the applicant by way of monthly instalments for in the event of any default in the payment of such instalments, the applicant can enforce the mortgages and this had actually happened.

I am reinforced in this conclusion by the applicant's consideration expressed in the preamble in all the six mortgages as being a stay of all executions upon the Singapore judgment. This is further reinforced by cl 2(o) of all the mortgages which are expressed in identical terms which stipulate that in the event of default, the applicant shall, in addition to exercising its right as a mortgagee, also exercise its rights as a judgment creditor.

There is also no evidence to show of any arrangement that any instalment payment received from MIL should be utilized first towards the settlement of the three bills of exchange and this fact alone defeats Sucaba's contention to that effect.

My attention was also drawn to an undated letter which appears at pp 44-46 of exh A-1 attached to Yeo's affidavit filed on 13 December 1988, which Sucaba maintains had altered whatever arrangements that had been agreed earlier in March 1978. Reading this undated letter, all that it states is to include additional terms and conditions already agreed to earlier but the fact that the Singapore judgment debt would be settled by instalments is very much evident as seen in para 4 of the letter.

From the contemporaneous documents, I cannot accept Sucaba's submission that the execution of the

mortgages is in itself evidence of a settlement of Yamaha's liability under the three bills of exchange.

Since there is no accord and satisfaction of Yamaha's liability, Yeo's statement made to the liquidator cannot be accepted as showing the true picture of Yamaha's indebtedness to the applicant. Moreover, the statement is worded in general terms and contains no particulars in what manner Yamaha's debt has been fully satisfied.

The Malaysian judgment obtained on 19 May 1978 is made up of (1) the principal sum of $2,947,032.06, (2) 10% interest pa on the amounts of the three bills of exchange calculated from 20 October 1977 to date of judgment amounting to $156,089.63, (3) 6% interest due on the principal sum of $2,947,032.06 to be calculated from the date of judgment to realization and (4) costs at $250.

It is Sucaba's contention that the accrued interest prior to 18 April 1981, amounting to $156,089.63, is time barred under s 6(3) of the Limitation Act 1953, which states that 'no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due'. In choosing 18 April 1981, Sucaba has worked the six-year limitation period backwards from the date of the notice of motion, 18 April 1987.

In calculating when time starts to run, I consider that the date of the notice of motion is quite irrelevant. What is more important is the date when judgment was entered as it is from that date that time starts to run for after all, a judgment creditor is expected to enforce a judgment debt forthwith but if he chooses to sit on the judgment and does nothing about it, he suffers the consequence of the period of limitation working against his interest.

Since the judgment was obtained on 19 May 1978, the six-year limitation period as far as enforcement of arrears of interest is concerned, commences from that date and the plaintiff is entitled to enforce all arrears of interest calculated up to 19 May 1984 and not arrears falling due after that date.

The applicant has also submitted that s 6(3) is not applicable to the facts of this case as the present proceedings is brought by way of a notice of motion to challenge the decision of the liquidation under r 93 of the Companies (Winding-Up) Rules 1972. Since the motion is nothing more than an appeal against the liquidator's decision, it is only a machinery to enforce a judgment as opposed to the filing of an action to enforce such a judgment.

I consider there is only a thin line dividing the machinery of enforcing a judgment and the actual enforcement of such a judgment particularly so when s 2 of the Limitation Act 1953 defines 'action' wide enough to include 'a suit or any other proceedings in a court of law'. Moreover the effect of bringing the present proceedings is nothing more than to seek enforcement of the judgment obtained in 1978 and to that extent, I consider that s 6(3) is applicable to the facts of this case.

Still on the non-applicability of s 6(3), objection was also taken by the applicant that under the provisions of the saving clause in s 3 of the Limitation Act 1953, the period of limitation imposed by s 6(3), is not applicable since r 93 of the Companies (Winding-Up) Rules 1972 under which this motion is founded has provided its own limitation period.

The period of limitation imposed by r 93 is nothing more than to enable a dissatisfied creditor to file a notice of motion to reverse or vary a liquidator's decision. This is clearly spelt out in the rule which, inter alia, also states that 'no application to reverse or vary the decision of the liquidator in a winding-up by the court shall be entertained, unless notice of the application is given before the expiration of twenty-one days from the date of the service of the notice of rejection'. Since the period of limitation in r 93 regulates when a notice of motion should be brought, and it has got nothing to do with the limitation period of enforcing a judgment, the applicant's objection on the non-applicability of s 6(3) read with s 3 and r 93 has no merit whatsoever.

Another attempt to exclude the provisions of s 6(3) was also made by reference to s 6(5)(b) which states that any action to recover money secured by any mortgage or charge on land or personal property is outside the limitation period imposed by s 6(1). It is the applicant's contention that since mortgages had been created in its favour, s 6(3) is not applicable.

Here again the applicant's objection must fail as the mortgages were created in Singapore in respect of the Singapore judgment. What is now sought to be enforced is not the Singapore judgment but the Malaysian judgment.

For reasons that I have given above, I allow the notice of motion with costs in terms of prayers (a) and (b) but in reversing the liquidator's decision, I also make a further order that the amount of the applicant's debt to be accepted by the liquidator be the amount that has been calculated by the applicant and annexed to the affidavit of the applicant's senior manager affirmed on 10 January 1990 as exh US-3. The costs of these proceedings are to be borne by Sucaba.

Appeal allowed.

Solicitors: *Shearn Delamore & Co; Rashid & Lee; Albar Zulkifly & Yap.*

Reported by *PS Ranjan*